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July 19, 1999

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Comments on the Proposed SBC-Ameritech Merger Conditions, CC Docket No. 98-141

Dear Ms. Salas:

On behalf of AT&T Corp., ("AT&T"), please find enclosed an original plus eight copies of the public version of AT&T's Comments in the above referenced proceeding in response to the Public Notice issued July 1, 1999 and the Commission's Order of July 7, 1999. A proprietary version of this document is being filed concurrently under seal pursuant to the Protective Order adopted by the Common Carrier Bureau. Please direct any questions to the undersigned.

Yours truly,

Michael J. Hunseder

Michael J. Hunseder

MJH/aa

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from AMERITECH CORPORATION, Transferor to SBC COMMUNICATIONS, INC., Transferee	))))))))))	CC Docket No. 98-141

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OFFICE OF THE SECRETARY

COMMENTS OF AT&T CORP. ON PROPOSED CONDITIONS

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In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from AMERITECH CORPORATION, Transferor to SBC COMMUNICATIONS, INC., Transferee	))))))))))	 CC Docket No. 98-141

COMMENTS OF AT&T CORP. ON PROPOSED CONDITIONS

Pursuant to the Public Notice issued by the Commission on July 1, 1999, and the Commission's Order of July 7, 1999, AT&T Corp. ("AT&T") respectfully submits these Comments in response to the "Proposed Conditions" set forth in the July 1, 1999 submission to the Commission from SBC Communications, Inc. ("SBC") and Ameritech Corporation ("Ameritech") (collectively "Applicants").

SBC and Ameritech claimed, at the time these Proposed Conditions were first placed on the public record for comment, that they had already received the endorsement of Commission Staff. If true, that approval was apparently granted in the course of closed-door negotiations with Applicants and should either be rescinded by Staff or overruled by the Commission. The Proposed Conditions serve no constructive purpose. They do not address in any meaningful fashion the serious competitive concerns which demonstrated that the merger as originally proposed would be anticompetitive and would fail the statutory public interest test. Nor do the Conditions mitigate those concerns by making Applicants' markets more open in any other, independent respect.

But the problem is not simply that these Conditions are useless and ineffectual as market-opening measures. It is that the adoption of these Conditions will affirmatively *harm* the prospects for competition. The Proposed Conditions not only fall short of what the Telecommunications Act of 1996 ("Act") and the Commission's Rules already require, but in many cases are unlawful, discriminatory, and anticompetitive, and would materially frustrate competitive entry. Most notably, Applicants have offered a series of "promotional" offerings (discounted loops and resold services and network element combinations) through which Applicants seek to arrogate to themselves the power to decide both the manner and scope of their competitors' market entry – and, as would be expected, they have used that power to ensure that no meaningful entry through these promotional offerings would be possible.

And even the Proposed Conditions that do not themselves directly violate the Act or the Commission's Rules, but that merely require less than what the Act and the Applicants' own prior commitments already require, will materially set back competition by giving rise to still further debate and litigation about whether these standards should serve as a lowest-common-denominator model for future federal and state proceedings in their regions and elsewhere. That is undoubtedly why SBC and Ameritech have so warmly embraced this proposal. For while Applicants have claimed that they would prefer an unconditional approval of their merger, approving the transaction with these Conditions would be the regulatory equivalent of throwing Br'er Rabbit into the Briar Patch.

In the face of this harmful proposal, the Commission retains several options. It could, and should, conclude that the many valid concerns about the anticompetitive consequences of the merger are well-founded and unaddressed by Applicants' Proposed Conditions, and deny the applications on that basis. Alternatively, if it believes that the possibility remains that different conditions could be crafted that would eliminate or compensate for those adverse consequences, the Commission should scrap the document SBC and Ameritech have drafted, and attempt to develop more serious requirements – this time with an open process in which other affected parties could participate meaningfully. But the worst outcome of all, from the standpoint of competition and consumers, would be to approve the merger with the Proposed Conditions (or some variant thereof). Indeed, if the Commission is determined to approve the merger, it would be far better to do so with no conditions at all than with the regressive and anticompetitive conditions that have been published for comment.

AT&T's Comments are divided into two principal parts. The body of the Comments addresses generally the fundamental problems with the Proposed Conditions as a whole, and explains why Applicants' proposal does not mitigate the anticompetitive consequences of the merger or present an improvement over the *status quo*, but rather will, if adopted, exacerbate the anticompetitive consequences of any Commission approval of this transaction. Appendix A then addresses, on a Condition-by-Condition basis, the specific flaws in, and adverse consequences of, each of the principal Proposed Conditions relating to local competition. The Comments also include in Confidential Appendix B a discussion of relevant confidential information submitted by Applicants.

ARGUMENT

The merger of SBC and Ameritech would enable a single firm to control a third of the nation's monopoly local telephone access lines – from Michigan to Texas, and including California and Connecticut – covering 40 percent of the total population of the United States.

AT&T's original Comments in this proceeding, and those of many other parties, demonstrated that the merger would be anticompetitive on numerous grounds. It would, for example, eliminate the otherwise imminent prospect of competition between the merging parties. And it would enhance both the ability and incentive of the merged entity to impede and foreclose competition within its region – in particular, by reducing the ability of the Commission to use benchmarking to effectively regulate Applicants and other incumbent local exchange carriers ("LECs").[1] The Chairman agreed that there were "serious concerns" about whether SBC and Ameritech "satisfie[d] th[e public interest] requirement."[2]

AT&T did not recommend that the Commission impose conditions in connection with the merger. Particularly in light of its experience from the Bell Atlantic-NYNEX merger – in which Bell Atlantic made a series of paper promises that subsequently generated no additional competition and lots of additional litigation – AT&T concluded that it was exceedingly unlikely that conditions that adequately addressed the anticompetitive consequences of the SBC-Ameritech merger could be crafted, and that it was even more unlikely, even if such conditions were possible, that they could effectively be enforced. Quite obviously, no conditions could make the two Regional Bell Operating Companies ("RBOCs"), once they were merged into a single entity, compete with one another, and no conditions could replace the lost benchmark. AT&T therefore recommended that the merger be disapproved outright.

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[1] *See* Petition of AT&T Corp. to Deny Applications, CC Docket No. 98-141 (FCC October 15, 1998) ("AT&T Petition to Deny").

[2] *See* Letter from Chairman Kennard to R. Notebaert (Ameritech) and E. Whitacre, Jr. (SBC), at 1 (FCC April 1, 1999).

The Commission apparently disagreed with the notion that developing meaningful and enforceable conditions was a hopeless effort, and launched the process that produced the current proposal. But that process was deeply flawed from the outset, for it effectively excluded all parties other than Applicants themselves. SBC and Ameritech held numerous "long and detailed discussions" with the Commission Staff[3] that no other interested parties attended or were informed about (except through boilerplate one-paragraph *ex parte* letters), and no drafts or even outlines of possible conditions were circulated. The deliberations and negotiations then led to a "common resolution" in which, according to Applicants, "Commission Staff . . . specifically indicated that the package of [proposed] conditions would satisfy their public interest concerns and lead them to support the proposed transfer of control."[4] By contrast, Applicants' claims about the "extraordinary level of public involvement" notwithstanding,[5] the amount of time and focus reserved for negotiations with Applicants dwarfed that available for meetings with other parties, and the single public forum that was held gave AT&T and all other interested parties merely the opportunity to read aloud a five minute prepared statement.

Any process structured in this way shuts out numerous parties who would have been able to make substantive contributions as proposed conditions were developed, and invariably calls into question the fairness and reliability of the results reached. Indeed, in light of the closed nature of this part of the process, and the spectacle of the regulated entities themselves announcing the supposed position and commitments of Commission Staff, numerous observers

[3] *See* Letter from Richard Hetke (Ameritech) and Paul Mancini (SBC) to Magalie Roman Salas, CC Docket No. 98-141, at 1 (FCC July 1, 1999) ("July 1, 1999 Letter").

[4] *See id.*

[5] *See id.*

have concluded that approval of the applications in conjunction with the conditions is a "done deal."

Even more importantly, this flawed process has produced a set of irreparably flawed conditions that exceed competitive LECs' worst fears. They do more than confirm that conditions will not mitigate the anticompetitive harms of the merger, or provide meaningful procompetitive benefits. They affirmatively violate the Act and would impede implementation and enforcement of the Act's requirements. *A fortiori*, they do not transform this anticompetitive merger into one that would serve the public interest. And *a fortiori*, they should not be adopted whether or not the merger is approved.

I. THE PROPOSED CONDITIONS DO NOT MITIGATE THE SPECIFIC ANTICOMPETITIVE HARMS OF THE MERGER OR OTHERWISE OPEN APPLICANTS' MARKETS

As a threshold matter, it is clear that the Proposed Conditions do not eliminate or mitigate the specific concerns that previously led Commission Staff to conclude that the merger would disserve the public interest. For example, the Conditions do not – as, of course, they cannot – recreate the competition between Ameritech and SBC that the merger will foreclose. Applicants appear to regard their out-of-region entry commitments (Condition XXI) as a substitute for the competition between them that will be lost. But even if such a trade-off were appropriate in the abstract, it has no application here. As AT&T showed in its Petition to Deny (at 41-42), the out-of-region entry assertedly contemplated by Applicants after their merger is no more substantial than the aggregate out-of-region entry that the two firms could and would have engaged in unilaterally absent a merger. Commitments to engage in such entry therefore cannot constitute a benefit of the merger that could be weighed against any detriment. Indeed, the entry plans memorialized in the Proposed Conditions reflect a substantial *retrenchment* from what was originally proposed in the applications. For example, SBC and Ameritech have reduced the number of cities they will initially enter, and targeted smaller cities for that initial entry, in order to make that entry correspond to cities in which the Williams Communications network (of which SBC proposes to acquire a 10 percent ownership interest) *already* has facilities – thus confirming that the out-of-region entry conditions, and, indeed, the merger itself, will deliver little or nothing in the way of out-of-region entry beyond what would have occurred in any event.[6]

The Proposed Conditions likewise do not respond materially to the reduction in benchmarks. SBC and Ameritech claim that their commitments to file ARMIS reports by operating company (Condition XVII) and service quality reports by State (Condition XV), as well as their agreement on performance measures (Condition I), "address[es] any 'benchmarking' concerns."[7] That is not remotely the case. The principal "benchmarking' concern" is that having a number of operationally independent incumbent LECs provides an extremely important check on claims that particular interconnection and access arrangements are not technically feasible. Time and again, this Commission and State regulatory commissions, which do not themselves have the resources to investigate many such assertions directly, have rejected pretextual claims by incumbent LECs that various procompetitive arrangements which

[6] Each of the specific points made about particular Proposed Conditions in the body of these comments is expanded upon and further supported in the Condition-by-Condition analysis provided in Appendix A. The organization of Appendix A follows the order employed in Applicants' filing, making it easy to locate the discussion of any specific condition.

[7] *See* July 1, 1999 Letter, at 4.

competitive LECs have sought could not realistically be made operational by pointing to other incumbent LECs that had offered those same arrangements. Separate ARMIS reports, service quality reports by State where the operating companies are subsidiaries of a LEC, and agreement on a small subset of performance measures do nothing to address the harm caused by losing yet another large LEC benchmark for assessing such claims.

Nor can it be said that the Conditions, although failing to address the specific competitive problems of the merger, nonetheless compensate for those problems by adopting other measures that will have a net positive effect in opening Applicants' markets. In that regard, Applicants' assertion that these conditions will make their region "the most open and competitive in the country"[8] is ludicrous – as a quick review of the characteristics of the principal Proposed Conditions confirms.

First, some of those Conditions merely restate that Applicants must abide by existing law[9] or their pre-existing commitments.[10] Compliance with statutes, regulations, and prior commitments is already their duty, and agreeing to such compliance is not a concession that should be traded for merger approval.

Second, other Conditions – contrary to Applicants' claim that the terms "go well beyond" what is already required of them[11] – fall far short of both what the law requires and what they

[8] *See id.* at 2.

[9] *See*, *e.g.*, Condition II ("SBC/Ameritech shall provide collocation consistent with governing Commission rules"); *see also* Condition X ("This Section does not impose on SBC/Ameritech any pricing requirements that the Commission does not impose on all incumbent LECs").

[10] *See*, *e.g.*, Condition IX ("SBC/Ameritech shall continue to provide UNEs in each [] State in accordance with the commitments made in the letter[s] . . . to Lawrence E. Strickling").

[11] *See* July 1, 1999 Letter at 2. These claims foreshadow Applicants' plans – as well as those of other incumbent LECs – to assert in other proceedings before the Commission and State

(continued . . .)

have previously committed to do. For example, the provision on performance measures (Condition I) offers considerably less than what SBC had already agreed to provide in Texas, and what it appeared (prior to release of these Conditions) to be willing to offer in its (and Ameritech's) other States. Condition I provides for only a small subset of the measures that are necessary to determine whether SBC and Ameritech are meeting their statutory obligations across the range of wholesale support activities that are critical to local competition, and only a small subset of the 121 performance measures agreed to in Texas. And it substantially limits damages liability *below* what SBC agreed to in Texas – such that if these Conditions were in operation in Texas today, SBC's liquidated damages payments to AT&T to date would have been reduced by 40 percent.

Third, in those few instances in which the Proposed Conditions offer something that for now is not otherwise required to be made available, the Conditions are written so as to assure that the offering will have absolutely no competitive benefit. The so-called "Carrier-to-Carrier Promotions" (Condition XI) provide a particularly vivid illustration. Even ignoring the facially discriminatory, unlawful, and anticompetitive nature of the provisions in that Condition (*see infra* at 14-16), they have been carefully crafted by Applicants to ensure that they present no threat to the Applicants' monopolies. To begin with, the caps have been set at extraordinarily low levels. AT&T estimates that the loop discount will apply to no more than 2.8 percent of the Applicant's total switched lines, and that the resale and platform offerings (taken together) will

(. . . continued)
regulatory commissions that the Commission's approval of the Proposed Conditions here establishes a bar above which they cannot or should not be required to exceed under the Act.

apply to no more than 4.7 percent of those total lines.[12] At their current rate of growth, SBC and Ameritech will have added more new lines by the time the Condition terminates than they will have provided under its terms even if all the caps are reached.

Moreover, there is little likelihood that even these tiny caps will be reached, for SBC and Ameritech have built in terms that will sharply reduce or even eliminate any limited appeal these offerings might otherwise have. For example, despite clear holdings by the Commission rejecting incumbent LEC efforts to prevent competitors that provide service through network elements from using those elements to provide exchange access, the so-called "platform" provided under these Conditions apparently may be used only to provide "residential local telephone exchange service." Proposed Conditions ¶ 48(d)(i). That is not the "platform" as that term has always previously been understood, because the ability to become an access provider and challenge the incumbent LECs' access monopolies has always been an integral component driving the economics and pro-competitive benefits of using the platform. Other provisions substantially limit any benefit from the discounted loop offering. In particular, SBC and Ameritech have reserved for themselves an extraordinary amount of pricing flexibility by providing that the 25 percent discount may be averaged across their entire merged region. *Id.* ¶ 46(d). This will enable them to load disproportionate amounts of the discounts into States, and regions of States, where competition through unbundled loops is less feasible (regardless of discount) or less threatening to the Applicants, and thereby "gate" any use that might otherwise be made of this provision.

[12] Even comparing the caps to Applicants' residential lines, Condition XI would apply to approximately 12.4 percent of those lines.

Fourth, while the inconsequential impact of these Conditions would render them useless even if they lasted longer, the short duration of these Conditions further limits any value they might be said to provide. The merger itself poses a serious and permanent threat to competition, yet the Conditions are highly temporary, and will expire in three years (or, in the case of the performance measures, 45 months). Those time frames, moreover, substantially *overstate* the actual duration of any presumed benefits. That is because many of those presumed benefits will not begin to be realized until one year, two years, or even longer after the merger closes. For example, Condition III provides for a minimum of 24 months prior to the deployment of operation support systems ("OSS") interfaces in accordance with industry standards and guidelines and a minimum of 30 months for the deployment of interfaces with uniform business rules – deadlines which apply only if the arbitration provisions (which provide no limit on the duration of any arbitration) are not invoked. As a result, the OSS *process* could easily extend beyond the expiration of the OSS *requirements*. And even if the OSS interfaces were actually deployed in the 24 and 30 month time frames, that would mean that the performance measures would apply to those interfaces for less than half of the period of time in which the performance measure requirements would be in effect.

Fifth, many of the Conditions are so vague and open-ended, or so inartfully (or artfully) drafted, that it is impossible to say what they mean or how they will be applied. The provision on "Waiver of OSS Charges" (Condition IV), for example, is incomprehensible. It provides in the first sentence that SBC and Ameritech may not charge "for use of [their] standard electronic interfaces for accessing OSS," but in the third sentence that it "does not affect SBC/Ameritech's right . . . to recover the costs of developing and providing OSS to CLECs through the pricing of

UNEs or resold services." Proposed Conditions ¶ 18. The most natural reading of this provision is that it takes back at the end what it purports to grant at the beginning, and will affect only the way SBC and Ameritech send their bills. If, by contrast, it is designed actually to provide a benefit, it does so in such opaque a fashion as to guarantee further litigation, controversy, and delay before any such benefit could conceivably be defined, much less implemented.[13]

Even beyond the drafting problems, however, many of the most important components of these Conditions are simply and purposefully left unaddressed. This is most conspicuously the case with respect to pricing, on which the Conditions are studiously silent. As the Commission has correctly observed, pricing is a "critical component" of any access and interconnection arrangement, because any arrangement, no matter how otherwise procompetitive, can be rendered useless by the wrong price. *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 113 (1996) ("*Local Competition Order*"). Yet virtually all the critical pricing terms issues are left out

[13] Even less obviously ambiguous provisions would undoubtedly have to be the subject of substantial litigation before (if ever) they could be applied so as to provide meaningful competitive benefits. The federal judge that presided over SBC's challenge to network element rates set by the Texas Public Utilities Commission aptly described SBC's approach to using litigation to forestall compliance with regulatory obligations:

> [The court is] troubled by SWBT's tactics in this case. SWBT's penchant for rehashing issues that had already been fully briefed, raising arguments and claims that did not appear in even the most generous reading of the Amended Complaint, and, most importantly, taking positions in this litigation that it had expressly disavowed in the PUC administrative hearing, were, to say the least, distressing. The voluminous briefing in this case – over seven hundred pages in total – could probably have been cut in half had SWBT not fought tooth and nail for every single obviously non-meritorious point.

Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc., No. A 97-CA-132 SS, 1998 WL 657717, *17 (W.D. Tex. Aug. 31, 1998).

of these Conditions, to be resolved at some future point exclusively by State commissions – in many instances, such as permanent loop conditioning rates (Condition VI) and shared transport (Condition VIII), without any meaningful constraints provided by the Proposed Conditions themselves. There is no way the Commission could determine that these Conditions would advance the public interest, much less that they would compensate for the anticompetitive harm of the merger, without knowing how the arrangements will be priced, and the Conditions have been written so as to assure both that the prices cannot be known today and that the Commission will have no authority over these prices when the Conditions are implemented in the future.

Indeed, in many instances these Conditions constitute precisely the kinds of "paper promises" to negotiate unspecified arrangements in the future that the Commission has rightly rejected in other contexts. *See* Memorandum Op. and Order, *Application of Ameritech Michigan to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd. 20543, ¶ 55 (1997). A meaningful offer on OSS interfaces, for example, would not simply promise to develop a plan for uniform integration in the future. Instead, it would present (at the very least) the terms of proposed plans now, so that parties and the Commission would know what was being proposed and Applicants would have substantive, rather than procedural, commitments with which to comply. Better still would be actual advance implementation of such commitments. But Applicants have not committed to undertake any of these obligations; they have merely made a contentless promise to make unknown commitments in the future.

Finally, the Proposed Conditions cannot be defended on the ground that, even if they provide (at best) minimal competitive benefits, they at least improve the process for enforcing those benefits. Several of the supposed enforcement provisions do not provide for enforcement at all, but merely purport to permit various conversations to take place that could just as easily occur with or without these conditions. That is the case, for example, with respect to the provision on Alternative Dispute Resolution (Condition XII), which states that competitive LECs and Applicants may talk about their disagreements in non-binding mediation. It is also the case with respect to the provision entitled "Compliance with Commission Pricing Rules" (Condition X), which provides that the Commission may note to State commissions any concerns it may have with Applicants' pricing, with the State commission then free to act or not as it sees fit. (AT&T is unaware of any instance in which the Commission has taken such action in the past, even though communicating concerns has always been within its power.) No experienced observer of the contentious and protracted process by which competitive LECs have attempted to obtain, implement, and enforce interconnection agreements could possibly regard these as serious measures. Nor could these measures remotely satisfy the Commission's independent obligation to adjudicate disputes under its own Rules.

The two other enforcement measures on which the Proposed Conditions rely heavily are independent auditors and damage penalties. But the reliance on these mechanisms is equally misplaced. With respect to the audits, in most instances their actual scope will be entirely up to Applicants, and "Commission approval of the requirements . . . shall not be required." *See* Proposed Conditions ¶¶ 6(a), 62(d)(1). In at least some cases, the auditors are not required to contact competitive LECs in order to obtain relevant information. More fundamentally, even with an adequate work plan, auditors have neither the training nor the expertise to resolve the interpretative disputes about the meaning of Commission orders that are likely to be at the heart of most compliance concerns. And the damage penalties for failure to meet performance measures or provide parity of service, as previously noted, are actually *weaker* than those to which SBC has previously agreed.

II. ADOPTION OF THE PROPOSED CONDITIONS WOULD BE UNLAWFUL AND WOULD AFFIRMATIVELY HARM COMPETITION

But the problem is not simply, or even primarily, that the Proposed Conditions would accomplish nothing. Conditions that were merely irrelevant to market-opening efforts would be a substantial improvement over the present proposal. This proposal, by contrast, would be affirmatively harmful.

First, several of the proposed terms are flatly illegal and contradict core premises of the Act. Indeed, each of several independent aspects of the "Carrier-to-Carrier Promotions" provisions (Condition XI) violate multiple provisions of both the Act and the Commission's Rules. For example, the caps on the number of discounted loop, resale, and platform offerings that will be made available to competitive LECs squarely violate both the "pick and choose" rule of Section 252(i) of the Act and 47 C.F.R. § 51.809(a) (which implements Section 252(i)). Those provisions require incumbent LECs to "make available any . . . service, or network element" provided under an approved interconnection agreement with one competitive LEC to any other competitive LEC that requests it and to do so "upon the same terms and conditions." *See* 47 U.S.C. § 252(i). Under the caps, however, competitive LECs would not be able to obtain the arrangements given to other competitive LECs "upon the same terms and conditions" once the caps had been reached.[14] And the same reasons render the caps unlawful under Section

[14] The fact that these arrangements are not, according to Applicants, required by the Act is irrelevant. As the Kentucky and North Carolina Commissions have held, the requirements of Section 252(i) apply to all such arrangements, including those that are not affirmatively required to be made available at all. The nondiscrimination principle, which is the basis for Section
(continued . . .)

251(c)(3), which requires incumbent LECs to provide "nondiscriminatory access" to network elements to "any" requesting carrier; under 47 C.F.R. § 51.313(a), which requires that "[t]he terms and conditions pursuant to which an incumbent LEC provides access to unbundled network elements shall be offered equally to all requesting telecommunications carriers"; under Section 251(c)(4)(b), which prohibits "discriminatory conditions" on resale; and under 47 C.F.R. § 51.603(a), which likewise requires that resale be "nondiscriminatory."

In addition to the illegal caps, the loop rate discounts likewise violate Sections 252(i) and 251(c)(3) of the Act, and 47 C.F.R. §§ 51.809(a) and 51.313(a). The loop conditions provide that a competitive LEC that uses an incumbent LEC's unbundled switch will obtain one rate for a loop, while a competitive LEC that uses its own switch will obtain a discount on the same loop – a straightforward act of discrimination that is precluded by law. And the limitation of the promotional rates for loops and the platform to "residential telephone exchange service" violates 47 C.F.R. § 51.503(c), which provides that "[t]he rates that an incumbent LEC assesses for elements shall not vary on the basis of the class of customers served by the requesting carrier, or on the type of services that the requesting carrier purchasing such elements uses them to provide," as well as the Commission's repeated holdings that CLECs may use unbundled network elements to provide exchange access services. *See Local Competition Order* ¶ 356;

(. . . continued)
252(i), prohibits carriers from conferring special benefits on some customers and not others. *See* Order, *Approval of the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc. and the Other Phone Co. Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996*, Case No. 98-165 (Ky. PSC June 30, 1999); Order on Negotiated Interconnection Agreement, *Resale Agreement Between BellSouth Telecommunications, Inc., and the Other Phone Co.*, Docket No. P-55, SUB 114 (N.C. PUC June 23, 1999).

Third Order On Reconsideration, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 12 FCC Rcd 12460, ¶¶ 38-39 (1997).

It is not surprising that SBC and Ameritech would seek the right to discriminate in providing service. Such a capability would enable them to place limits on entry, and to skew their offerings in those directions that pose the least competitive threat to their monopolies – as they have here. But it would be extraordinary – and arbitrary and capricious in the extreme – for the Commission to endorse the notion that such anticompetitive and illegal conduct would serve the public interest. For in addition to its manifest unlawfulness, such a decision would be manifestly bad policy. In the *Local Competition Order* (¶ 12), the Commission recognized that its role under the Act was not to "express[] a preference for one particular entry strategy" and try to micromanage the competitive process by creating artificial incentives for competitive LECs to pursue some strategies and reject others. Rather, its job is "to establish rules that will ensure that all pro-competitive entry strategies may be explored" and then let "the market, not . . . regulation," determine which succeeds. *See id.* Here, however, through the discriminatory loop discounts and the other provisions, the Commission would be distorting the market to create incentives for a particular facilities-based entry strategy, and particular entrants, that it and Applicants would have chosen to favor.[15] Adoption of these conditions would represent a

[15] Indeed, the loop discounts skew the market not only against carriers that purchase the loop and the switch from the incumbent, by subjecting them to higher loop rates than carriers that use their own switches, but also against carriers that intend to use their own loops and switches. Such carriers make investments, like AT&T's investments in cable assets, based on the forward looking costs of loops and switches. There is no conceivable public policy basis (much less a lawful, non-arbitrary one) to subsidize their competitors by creating a 25 percent discount off the cost-based price simply because those competitors have chosen a different entry strategy.

radical, unexplained, and wholly unwarranted departure from foundational regulatory principles under the Act.

Different problems of illegality are presented by the terms for "Structural Separation for Advanced Services" (Condition VII). Unlike the "Carrier-to-Carrier Promotions," Condition VII is not unlawful on its face. It has been made explicit, however, that SBC and Ameritech will implement that condition in an unlawful fashion. Specifically, SBC and Ameritech have filed an *ex parte* letter in which they indicate that they will not regard the separate subsidiary as a "successor or assign" under Section 251(h), and therefore will not treat the affiliate as if it were subject to the requirements that apply to incumbent LECs.[16] Because the separation requirements set forth in Condition VII are so trivial, and the permitted intermingling of the operations and assets of SBC-Ameritech and its affiliate under those requirements so pervasive, it will be a "successor or assign" and SBC-Ameritech will be acting unlawfully when it treats the affiliate as a non-incumbent LEC. Far from promoting competition, this Condition appears to be a device through which Applicants will seek unlawfully to evade the market-opening requirements of the Act.

Second, even apart from the illegalities of some of the Conditions, the overall effect of the adoption of this proposal would be substantially to undermine ongoing efforts to implement and enforce existing state and federal rules that represent more faithful attempts to implement the Act's procompetitive requirements.[17] The Commission would likely assert, if it adopted these

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[16] *See* Letter from Michael K. Kellogg (Kellogg, Huber, *et al.*) to Christopher J. Wright (FCC), CC Docket 98-141, at 1 (FCC June 25, 1999).

[17] For example, the New York Public Service Commission ("PSC") has imposed much more serious requirements on Bell Atlantic than anything included in this proposal. While AT&T

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Conditions, that the Conditions do not represent a construction of what is required by Section 251, but rather are merely a set of independent and voluntary commitments. But regardless of what the Commission says, it will undoubtedly be argued that the Conditions should be treated as if they reflected the Commission's view of the optimal set of requirements and enforcement measures to obtain compliance with the Act. For while these proposed requirements fall short of what the Act itself requires, SBC and Ameritech have asserted in presenting them for comment that the requirements exceed what is already required by law. And some observers will presume that, since it would be illogical for the Commission to approve a merger it had found to be otherwise anticompetitive because of conditions that require *less* than (or even the same as) what the law already demands, the adoption of these Conditions must indicate that the Commission agrees with SBC and Ameritech that the Conditions exceed the requirements of the Act.

The Proposed Conditions would then become, at least in many places, the basis for disputes about whether they are a *de facto* ceiling on the requirements incumbent LECs will be expected to meet. Indeed, Applicants and other incumbent LECs have already begun that process. On June 28, 1999, for example, Ameritech sought rehearing of the performance measures that the Michigan PSC adopted pursuant to Section 251 and Michigan law on the ground that "in the near future, the FCC is likely to adopt a set of performance measurements" as

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(. . . continued)
does not agree with every aspect of the New York PSC's decisions, it has imposed much more substantial obligations to provide network element combinations – without numerical caps and for a substantially longer period of time. Similarly, with respect to OSS, the New York PSC has required independent third-party testing, commitments to provide flow-through capability, and other significant steps that are absent from the SBC-Ameritech proposed conditions. The ability to obtain such procompetitive requirements would be jeopardized by any indication that this Commission believes that requiring less of incumbent LECs is appropriate or desirable – which, rightly or wrongly, is the implication that would be drawn from approval of these conditions.

part of "the approval process involving the proposed SBC/Ameritech merger," and that the Michigan PSC should seek "uniformity" rather than maintain more demanding requirements.[18] Ameritech further states:

> Ameritech Michigan submits that certain of the measurements approved by the Order conflict with those which are likely to be approved by the FCC. Implementing such measurements in the interim before imminent FCC action would not be in anyone's interest. Ameritech Michigan would be required to devote significant resources to implementing processes that would not survive FCC action, only increasing costs with no corresponding benefit.[19]

Similarly, on July 13, 1999, in a workshop before the California Public Utilities Commission on performance measures, GTE specifically argued that "Commissioner Kinnard [sic] of the FCC and the FCC seems to have reached agreement in principle with Southwestern Bell/Ameritech" on performance measures and that this "agreement" should be looked to by state commissions for guidance, because "here's a federal body [that] says . . . . [what it] think[s] is more or less appropriate for this."[20] As these examples indicate, the most likely effect of the adoption of these Conditions will not be to promote compliance with the Act, but to encourage efforts to define downward what compliance means.

For all these reasons, the Commission should reject the Proposed Conditions. Once it does so, it has three alternatives.

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[18] *See* Ameritech Michigan's Petition for Rehearing or Clarification, *Ameritech Michigan's submission on performance measurements, benchmarks, and reporting in compliance with the October 2, 1998 Order in MPSC Case No. U-11654*, Case No. U-11830, at 5-6 (Mich. PSC June 28, 1999).

[19] *Id.* at 5.

[20] Transcript of Workshop of Performance Measures for GTE, Rulemaking 97-10-016, at 862-863 (Cal. PUC July 13, 1999).

The most appropriate decision in this proceeding remains what it always was: denial of the applications. All the concerns that led commenters and Commission representatives to conclude that the proposed merger would harm competition remain valid, and the conditions process has, if anything, confirmed that conditions cannot address those harms. Because the merger would disserve the public interest, the Commission should disapprove it and move on.

In the alternative, the Commission may wish to attempt again to design conditions that compensate for the anticompetitive effects of the merger. But in that case it should recognize that the Proposed Conditions do not provide a constructive starting point and should be discarded. And the process should be radically different from the last time. In cases like this, involving mergers presenting grave risks to competition and to the central purpose of the Act, the process should be collaborative with all parties, and far less bilateral; the "conditions" should be *pre*conditions, not paper promises, that would need to be specified and met prior to approval; and any drafting should be done by Commission Staff rather than Applicants. Leaving the drafting of the requirements and enforcement measures to the Applicants, as these Conditions confirm, is akin to asking the fox to design the security system for the henhouse.

Finally, the Commission might conclude that it should approve the merger. AT&T would strongly disagree with that conclusion. If, however, the Commission makes such a decision, it should not aggravate the anticompetitive consequences of the merger by adding these conditions. It should grant the applications unconditionally, rather than expanding the harm; and it should make explicit what is already apparent: the Proposed Conditions neither meet the requirements of the Act nor promote the public interest.

CONCLUSION

For the reasons stated above, the Commission should reject the Proposed Conditions and deny the applications to transfer licenses.

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